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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 RODNEY GARROTT,

10 Plaintiff,

11 v.

12 MICHAEL LEFRANCIS, et al.,

13 Defendants.  
14

CASE NO. C07-131RSM

ORDER ON RENEWED MOTION FOR  
SUMMARY JUDGMENT

15  
16 This matter is again before the Court for a ruling on defendants' renewed motion for summary  
17 judgment. Dkt. # 66. In this motion, defendants raise for the first time (apart from their Answer) the  
18 issue of exhaustion of administrative remedies. On January 19, 2010, the Court directed the parties to  
19 brief this issue, as the record, was at that time, incomplete. The parties have responded and the matter is  
20 now ready for consideration. For the reasons set forth below, the Court finds that plaintiff has failed to  
21 meet the exhaustion requirement, and the complaint must be dismissed without prejudice.

22 BACKGROUND AND PROCEDURAL HISTORY

23 Plaintiff Rodney Garrott, originally appearing *pro se*, filed this civil rights complaint pursuant to  
24 42 U.S.C. § 1983 to allege that he was subjected to excessive force by a corrections officer on July 22,  
25 2005, while he was a pre-trial detainee at King County Correctional Facility. He named several  
26 corrections officers, as well as King County, as defendants in the action. Defendants filed an earlier  
27 motion for summary judgment addressing the merits of the action against the individual officers, and

1 contending that Corrections Officer LeFrancis, who was actually escorting plaintiff at the time of this  
2 incident, had not used excessive force in restraining him. Dkt. # 24. The question of exhaustion was  
3 not raised at that time. The Magistrate Judge to whom the matter was referred recommended that  
4 summary judgment should be denied as to Officer LeFrancis and King County, but granted as to the two  
5 other individuals. Report and Recommendation, Dkt. # 33. The Court adopted the Report and  
6 Recommendation over defendants' objections. Dkt. # 47.

7 Following dismissal of the two individual defendants, the Court appointed counsel from the *pro*  
8 *bono* panel to assist plaintiff in preparing the matter for trial. A trial date was set, with new deadlines  
9 for discovery and dispositive motions. Dkt. # 48. The trial date and all associated dates have been  
10 continued several times. Dkt. ## 57, 60, 63. Trial is now set for March 8, 2010.

11 In defendants' renewed motion for summary judgment, they assert several bases for dismissal,  
12 but the question of exhaustion must be decided before the Court can reach the merits of the other  
13 arguments. The Court earlier found that exhaustion was properly pled as an affirmative defense in the  
14 Answer, and defendants did not waive the defense by failing to raise it in their first summary judgment  
15 motion. Order, Dkt. # 74.

## 16 ANALYSIS

### 17 a. Legal standard

18 Summary judgment should be rendered "if the pleadings, discovery and disclosure material on  
19 file, and any affidavits show there is no genuine issue as to any material fact and that the movant is  
20 entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" if "a reasonable  
21 jury could return a verdict for the nonmoving party" and a fact is material if it "might affect the outcome  
22 of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The  
23 evidence is viewed in the light most favorable to the non-moving party. *Id.* "[S]ummary judgment  
24 should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could  
25 return a verdict in its favor." *Triton Energy Corp. v. Square D Co.*, 68 F. 3d 1216, 1221 (9th Cir. 1995).  
26 It should also be granted where there is a "complete failure of proof concerning an essential element of  
27 the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The mere existence

1 of a scintilla of evidence in support of the non-moving party's position is not sufficient" to prevent  
2 summary judgment. *Triton Energy Corp.*, 68 F. 3d at 1221.

3 **b. Analysis---Exhaustion of Administrative Remedies**

4 The Prison Litigation Reform Act ("PLRA") created a requirement that prisoners exhaust  
5 administrative remedies within the prison grievance system before filing a civil rights lawsuit regarding  
6 prison conditions. This exhaustion requirement is set forth as follows:

7 No action shall be brought with respect to prison conditions under section 1983 of  
8 this title, or any other Federal law, by a prisoner confined in any jail, prison, or other  
correctional facility until such administrative remedies as are available are exhausted.

9  
10 42 U.S.C.A. § 1997e(a). The Supreme Court has held that compliance with this provision is not "left to  
11 the discretion of the district court, but is mandatory." *Woodford v. Ngo*, 548 U.S. 81, 85 (2006). The  
12 requisite exhaustion is "proper exhaustion," which "demands compliance with an agency's deadlines and  
13 other critical procedural rules because no adjudicative system can function effectively without imposing  
14 some orderly structure on the course of its proceedings." *Id.* at 90-91. The exhaustion requirement  
15 applies even where the relief sought---monetary damages---cannot be granted by the administrative  
16 process. *Id.* at 85 (citing *Booth v. Churner*, 532 U.S. 731, 734 (2001)). The PLRA applies to pretrial  
17 detainees. 42 U.S.C. § 1997e(h) (defining "prisoner" to be "any person ... detained in any facility who is  
18 accused of ... violations of criminal law").

19 Section 1997e(a) requires complete exhaustion through any available process. See *Porter v.*  
20 *Nussle* 534 U.S. 516, 524 (2002) ("All 'available' remedies must now be exhausted."). Section  
21 1997e(a) also requires proper exhaustion. *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). "Proper"  
22 exhaustion means full compliance by a prisoner with all procedural requirements of an institution's  
23 grievance process. *Id.* at 93-95. If administrative remedies have not been exhausted at the time an action  
24 is brought, it must be dismissed without prejudice. See *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th  
25 Cir.2002) (per curiam).

26 Failure to satisfy the PLRA exhaustion requirement is an affirmative defense as to which the  
27 defendant has the burden of proof. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir.2003). In deciding a

1 motion to dismiss for failure to exhaust, the Court may look beyond the pleadings and decide disputed  
2 issues of fact. *Id.* at 1119-20. “If the district court concludes that the prisoner has not exhausted  
3 nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice.” *Id.* at 1120. Here,  
4 although the pending motion is one for summary judgment rather than a Rule 12 motion to dismiss, the  
5 same standards and burden of proof apply.

6 Defendants have filed a declaration and exhibits containing the records from plaintiff’s period of  
7 confinement at the King County Jail during the relevant time period. Declaration of Bruce Reeder, Dkt.  
8 # 76. The record includes copies of several grievances filed by plaintiff, but none of these addresses the  
9 incident at issue here. *Id.*, Exhibit B, C, D, E. These grievances span the period from March 16, 2005  
10 to April 13, 2006, thus bracketing the date of the incident. *Id.* Defendants assert that these grievances  
11 demonstrate that plaintiff was familiar with the grievance system and knew how to follow the procedure.  
12 Defendants have also filed a declaration by an administrative specialist at the King County Correctional  
13 Facility who searched the grievance logs both by computer and by hand (for the paper records), and  
14 found no grievance filed by plaintiff related to this incident. Declaration of Jerod Seiber, Dkt. # 78, ¶¶  
15 7-10. He found a record of the infraction plaintiff received for his actions on July 22, 2005, but no  
16 grievance related to Officer LeFrancis’ actions. *Id.*

17 Plaintiff’s supplemental memorandum argues that he did properly exhaust administrative  
18 remedies, because he filed an initial grievance on the matter. Plaintiff filed with his supplemental  
19 memorandum a declaration stating, under penalty of perjury, that “I filed a King County Jail grievance  
20 in attempt at redress and exhaust [sic] state remedies. This effort was futile, as I received no response.”  
21 Declaration of Rodney Garrott, Dkt. # 79, Exhibit A.

22 According to defendants, an inmate has fourteen days from the date of the incident to submit a  
23 grievance. Grievances alleging any type of gross misconduct by staff are immediately forwarded to the  
24 supervisor and prioritized for immediate review. Declaration of Bruce Reeder, Dkt. # 76, ¶¶ 9, 10.  
25 Given this immediate review provision, when plaintiff received no response to his grievance, he would  
26 still have time within the fourteen days to file another one. Plaintiff does not assert that he made another  
27 attempt at filing a grievance, or tried in any way to appeal the lack of response.

1 Plaintiff's conclusion that further efforts at exhaustion would be futile does not excuse the  
2 exhaustion requirement. *See Booth*, 532 U.S. at 741 n. 6 (stating courts should not read "futility or other  
3 exceptions" into § 1997e(a)). Rather, § 1997e(a) requires that plaintiff present his claims to each level  
4 of administrative review set forth above before raising those claims in a § 1983 complaint in federal  
5 court. It is clear from the parties' supplemental memoranda and exhibits that plaintiff did not pursue all  
6 levels of administrative grievances available to him. As there is no applicable exception to the  
7 exhaustion requirement, dismissal without prejudice is appropriate.

#### 8 CONCLUSION

9 Defendants have met their burden of showing that plaintiff did not properly exhaust his  
10 administrative remedies as required by 42 U.S.C. § 1997e(a). As explained above, plaintiff's  
11 declaration fails to rebut defendants' proof. Defendants' motion for summary judgment on the  
12 exhaustion issue (Dkt. # 66) is accordingly GRANTED, and the complaint is DISMISSED without  
13 prejudice for failure to exhaust.

14 This case could and should have been resolved on the basis of exhaustion over two years ago.  
15 As noted in the Court's earlier Order directing supplemental briefing on the exhaustion question, an  
16 unenumerated Rule 12(b) motion is an appropriate vehicle for raising this defense. *Wyatt v. Terhune*,  
17 315 F.3d 1108, 1119 (9th Cir.2003). Had such motion been brought in mid-2007, the Court and the  
18 parties would have been spared an unnecessary expenditure of resources on this action, including the  
19 scarce resources of the *pro bono* panel. The Court wishes to thank plaintiff's *pro bono* counsel for his  
20 diligent effort in this matter.

21 The Clerk shall close the file, and shall indicate on the docket that counsel's representation of  
22 plaintiff is now terminated. The Clerk shall then send a copy of this Order to the plaintiff at his address  
23 of record.

24 Dated this 18<sup>th</sup> day of February, 2010.



26 RICARDO S. MARTINEZ  
27 UNITED STATES DISTRICT JUDGE